UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DECKER TRUCK LINE, INC.

and **Case 27-CA-107239**

DAVID MILLER ESQ., THE SAWAYA LAW FIRM

Julia M. Durkin, Esq.
Jose R. Rojas, Esq., and
Leticia Pena, Esq.
for the General Counsel.
Emily F. Keimig, Esq., and
Karla E. Sanchez, Esq.
for the Respondent.
David Miller, Esq.
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Denver, Colorado, on April 8–10 and May 7–8, 2014. David Miller (the Charging Party or Miller) filed the original charge on June 13, 2013,[1] and the first amended charge on August 22, 2013. The Charging Party filed the second amended charge on December 13. The General Counsel issued the original complaint on September 18, and the amended complaint and notice of hearing on January 31, 2014. Decker Truck Line, Inc. (the Respondent or Decker) file timely answers denying all material allegations.

The complaint alleges that the Respondent violate Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about their protected concerted activities and

[1] All dates are in 2013 unless otherwise indicated.

the protected activities of other employees, and threatening its employees with discharge if they complained about Respondent not paying its employees overtime pay. The complaint further alleges that the Respondent violated Section 8(a)(1) of the Act by disciplining an employee and discharging another employee in retaliation for engaging in protected concerted activities. At the hearing, I granted the General Counsel's request to amend the complaint to include an allegation that the Respondent violated Section 8(a)(1) of the Act by requesting, through its attorney in the form of subpoenas duces tecum, certain information from current or former employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel[2] and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and principal place of business in Fort Dodge, Iowa and an office in Fort Collins, Colorado, transports freight interstate and intrastate by truck. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and the Respondent's Operations

The Respondent, Decker Truck Line, Inc., is a motor carrier registered with the United States Department of Transportation (DOT). Decker employs more than 750 drivers. Most of Decker's drivers are "over-the-road" (OTR), meaning that they do not drive the same route each day and are often on the road for long stretches of time. The OTR drivers report to fleet managers stationed at any of Decker's eight terminals, and they do not report to any one manager on a daily or other set basis. Their assignments vary by distance and load.

This case concerns Decker's operations in Fort Collins, Colorado, where, during the relevant time period, it employed about eight local shuttle drivers at the New Belgium Brewery (NBB). These drivers shuttle beer and related products between NBB's brewery and its warehouse, sometimes referred to as "the res," roughly 5.5 miles away. Specifically, beer and related products are sent from the brewery to the res, and then the drivers return to the brewery with an empty trailer or with items needed for the brewery.

OTR drivers are paid by the mile, whereas the NBB drivers are paid by the hour, as discussed more fully below. OTR drivers use a communications system called Qualcomm for dispatch and tracking, and for letting Decker know of any incidents. The NBB drivers do not use this system and their supervisor does not have access to it.

[2] The General Counsel's brief points out numerous errors in the transcript along with unopposed motions to amend the transcript to correct these errors, which are hereby granted.

B. Policies

Like all companies, Decker has policies and rules that apply to its employees. Relevant here, Decker has a progressive disciplinary policy that applies to all drivers who have been employed more than 90 days. The policy delineates the following steps:

- counseling for the first offense,
- verbal warning for the second offense,
- written disciplinary letter for the third offense,
- seven-day suspension for the fourth offense, and
- termination for the fifth offense.

The policy contains a provision permitting immediate suspension or termination for certain offenses, including but not limited to:

- falsification of misrepresentation of an employee's application for employment,
- insubordination or disrespectful conduct,
- violation of safety and health rules,
- sexual or other harassment or discrimination,
- theft or misuse of company property,
- possession or sale of alcohol or drugs on the employer's premises or while operating a Decker vehicle,
- falsification of records,
- carrying weapons on company property including vehicles,
- and fighting or threatening violence while on duty or on the employer's premises.

(GC Exh. 9.)[3]

Decker's employee manual, section 501, contains a policy entitled "Employee Conduct and Work Rules" which states, in pertinent part:

> It is not possible to list all forms of behavior that are considered unacceptable in the workplace. However, the following examples of infractions of rules of conduct, together with other reasons which are not specifically listed herein, may result in disciplinary action, up to and including termination of employment:
>
> Fighting or threatening violence while on duty or at any time while on the premises of the Company.
>
> Insubordination or other disrespectful conduct.

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R Br. for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

> Violation of safety and health rules.
>
> Sexual or other unlawful or unwelcome harassment or discrimination in violation of the Company policy.
>
> Theft or inappropriate removal, use or possession of Company property.
>
> Possession, distribution, sale, transfer or use of alcohol or illegal drugs on the premises of the Company or while on duty or while operating employer-owned vehicles or equipment.

(GC Exh., 20, p. 47.) Section 503, entitled "Sexual and Other Unlawful Harassment," states:

> The Company is committed to providing a work environment that is free of discrimination and unlawful harassment. Actions, words, jokes, or comments based on an individual's sex, race, ethnicity, age, religion, or any other legally protected characteristic will not be tolerated. As an example, sexual harassment (both overt and subtle) is a form of employee misconduct that is demeaning to another person, undermines the integrity of the employment relationship, and is strictly prohibited. Any employee who has been subjected to sexual or other unlawful harassment by any other employee should promptly report the matter to the Safety and Human Resources Department. If the employee believes it would be inappropriate to contact this department, the employee should contact the President. Employees can raise concerns and make reports without fear of reprisal. Any supervisor or manager who becomes aware of possible sexual or other unlawful harassment should promptly advise the Safety and Human Resource Department, who will handle the matter in a timely and confidential manner. Any person engaging in sexual or other unlawful harassment will be subject to disciplinary action, up to and including termination of employment.

(GC Exh, 20, pp. 47–48.) Finally, Decker has a "Policy on Harassment and Discrimination" which sets forth its "zero-tolerance standard for any type of harassment or discrimination." (GC Exh. 20, p. 85.)

C. The Fort Collins Facility and Operations

Decker received the contract to transport beer and related products for NBB in or around January 2011. At all relevant times, Rick Lackner was the shuttle drivers' supervisor and the only Decker supervisor or manager located in Fort Collins. Decker hired Lackner as a driver in 1998 and was eventually promoted to supervisor. (Tr. 923–924.) Lackner reported to Lonnie Wallace, who at the time was Decker's vice president of reefer operations,[4] Wallace worked out of the corporate office in Fort Dodge, Iowa. At all times relevant to this complaint, Brenda McNealy was the vice president of human resources and Dale Decker was Decker's industry and

[4] At the time of the hearing, Wallace was the chief operating officer (COO), a position he had held for roughly a month.

government relations director. Both McNealy and Dale Decker also worked at the corporate office in Fort Dodge.

The day shift runs from 5:45 a.m. to 5:45 p.m. and the night shift runs from 5:45 p.m. to 5:45 a.m. Drivers were expected to arrive 15 minutes prior to the start of the shift, so they clocked in at 5:30 a.m.. Four drivers worked Sunday through Tuesday and every other Wednesday. The other four drivers worked the opposite days. During the relevant time period, the drivers whose schedules started on Sunday were Joseph Griego, Jennifer Johnson, Joe ("JR") DeHerrera, and Eric Merkner. The drivers whose shift started on Wednesday or Thursday were Ron Carvalho, Wade Schnabel, Stewart Hutchins, and Allen Gerstner. The drivers worked in pairs of two, with one pair covering the day shift and the other covering the night shift, on a rotating basis. [5]

Each driver was assigned one truck per shift. Drivers started their workday at the brewery, and shuttled back and forth between the brewery and the res throughout the day. When a load was ready for delivery, the driver would receive a call on a cell phone Decker assigned for that driver's truck. (Tr. 110–111.) The route is about 45 minutes round trip. Though the number of loads per shift varied, the drivers averaged about 10 trips per shift. (Tr. 122, 502, 630.) If there was not time to deliver a load at the end of the shift and return before it was time for the driver to clock out, the driver would "stage" it, i.e. get it ready to go so the driver on the next shift could take it right away. (Tr. 123, 631.)

Drivers were paid a straight hourly rate with no overtime pay. For every week a driver did not have any safety incidents, he or she received an extra dollar of pay. At times, the brewery would close down for cleaning or mechanical issues. When this occurred, the drivers were paid for a full shift even if they did not work a full shift.

When coming on shift, drivers would talk to the driver from the previous shift to see how the plant was running and whether there were any issues with the trucks. If there was a problem with the vehicle, the driver on the shift before would notify the driver coming on their shift. (Tr. 623–624.)

At the brewery, there is a drivers' facility with a file cabinet for paperwork and a white board, referred to as the "grease board" or the "safety board." Lackner was the only person who wrote on the grease board, and he used it as a means to convey information to the drivers.

D. Pre-Trip and Other Inspection Forms

A pre-trip inspection is, as its name suggests, an inspection of the vehicle the driver must perform prior to driving it. Each Decker NBB driver is required to maintain a commercial drivers' license (CDL). The requirements of pre-trip inspections are part of the written test to obtain a CDL. Federal Motor Carrier Safety Administration (FMCSA) regulations, at 49 CFR §§ 300 et seq., require drivers to perform a pre-trip inspection and document it at the end of the day. FMCSA regulations, at 49 CFR § 396.13 state:

[5] Johnson did not rotate shifts and only worked nights.

> Before driving a motor vehicle, the driver shall:
>
> (a) Be satisfied that the motor vehicle is in safe operating condition;
> (b) Review the last driver vehicle inspection report; and
> (c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. The signature requirement does not apply to listed defects on a towed unit which is no longer part of the vehicle combination.

The regulations are more specific at 49 CFR § 396.11(a)(4), stating:

> Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated, except for intermodal equipment tendered by an intermodal equipment provider. The report shall cover at least the following parts and accessories:
>
> (i) Service brakes including trailer brake connections;
>
> (ii) Parking brake;
>
> (iii) Steering mechanism;
>
> (iv) Lighting devices and reflectors;
>
> (v) Tires;
> (vi) Horn;
>
> (vii) Windshield wipers;
>
> (viii) Rear vision mirrors;
>
> (ix) Coupling devices;
>
> (x) Wheels and rims;
>
> (xi) Emergency equipment

Drivers who do not have documentation of having done a pre-trip inspection can be fined by the Department of Transportation.[6]

Pursuant to 49 CFR § 396.1, "Every motor carrier, its officers, drivers, agents, representatives, and employees directly concerned with the inspection or maintenance of commercial vehicles must be knowledgeable of and comply with the rules of this part." Under

[6] Drivers also filled out bills of lading, which identify the product in the truck and the location of delivery. When a load was delivered to the res, the driver recorded the time and items delivered on the activity sheet. The driver also gave one copy of the bill of lading to the res.

49 CFR 396.11, when "a duty is prescribed for a driver or a prohibition is imposed upon the driver, it shall be the duty of the motor carrier to require observance of such duty or prohibition."

When the drivers were hired, they underwent a 3-day orientation, which included watching some videos, a road test, and going over the driving route. The road test included a section on pre-trip inspections and emergency equipment. This part of the test documented whether the driver checked the general condition of the unit; looked for coolant, fuel or lubricant leaks; checked under the hood for the oil, water, steering, and general condition o the engine; checked around the unit, specifically the tires, lights, trailer hook-up, brake and light lines, body, doors, horn, and windshield wipers; tested brake action, tractor protection valve, and parking brake; checked horns, windshield wipers, mirrors, emergency equipment, reflectors, flares, tire chains (if necessary), and the fire extinguisher; checked instruments, dashboard warning lights, windshield, windows, mirrors, lights, and reflectors; and reviewed and signed the previous report. (R. Exhs. 2, 9.)

Drivers also received a 220-page orientation manual. The orientation manual instructed an employee to do a thorough pre-trip inspection of the semi-trailers, including walking around the trailer to check for any damage, checking tires condition and tire pressure, verifying that lights are working, and checking mirrors for adjustment and cleaning. (GC Exh. 20, p. 9.) Another section of the manual, entitled "Maintenance," stated: "Drivers are not permitted to work on, around, or under their vehicle or trailer and will not perform preventative maintenance while on NBB property." (GC Exh. 20, p. 31.) During orientation of the employees who started in February 2011, Lackner told the drivers they could not lift the hood of the vehicles on NBB property. A couple of months later, Lackner told a group of drivers that NBB said it was okay for them to check the oil and similar tasks, as long as they did not do anything to make messes on NBB property. (Tr. 604, 610–611.)

Prior to starting work at Decker, drivers completed an NBB driver shuttle service quiz. One of the questions asked whether the driver must perform a through pre-trip inspection of the equipment daily, with the correct answer being "T" for true. (R Exhs. 1, 10.) On a written examination for drivers, one of the questions asked the driver to verify that he/she must be satisfied that parking brakes, tires, lights and reflectors, mirrors, coupling and other devices were in good working order before the vehicle could be driven. (R Exh. 3.)

Once drivers began work, after punching in, they picked up inspection forms and an activity sheet, sometimes referred to as a load sheet.[7] (GC Exhs. 3–4.) The drivers' vehicle inspection report required drivers to fill in their name, address, date, tractor and trailer number, and odometer reading. For the tractor, the driver was required to place a checkmark next to any of 38 delineated parts that were defective, with a catchall "other" category to cover any other parts. For the trailer, the driver was to do the same for any of 14 delineated parts, with the same catchall "other" category. (GC Exh. 3.) A full pre-trip inspection for the Decker drivers at NBB took about 15 minutes.

[7] OTR drivers did not use the pre-trip inspection form, but instead entered their pre-trip inspection into an electronic on-board recorder (EOBR), which was part of the Qualcomm system. (Tr. 791.)

Loads of beer were considered "staged" when a loaded trailer was hooked to the truck and ready to go for delivery. Per Lackner's instructions, if a load was ready to go when a driver came onto his or her shift, the driver was instructed to take the load immediately and then do the pre-trip inspection. (Tr. 101, 519–521, 610, 622–625.) Lackner had seen driver Jennifer Johnson take a staged load prior to doing a pre-trip inspection but she was not disciplined. Johnson witnessed all the other drivers do the same thing. (Tr. 626–629.)

At the end of the shift, drivers turned in the inspection forms consisting of one pre-trip inspection and one post-trip inspection per shift, to the drivers' room.

E. Background Events in 2012

Lackner told Johnson, DeHerrera, and a former driver named Shane that people were not removing rubber stops used on trailer tires called "chocks" before taking loads, and he was going to start making drivers who did not remove the chocks pay for tires. Lackner told Johnson that Hutchins was the driver with whom he had a problem in this regard. Nobody was told they were being disciplined about the chock issue. (Tr. 616–618.)

Joseph Griego began working as a driver for Decker on June 6, 2012. At the time, he had consistently maintained his CDL since 1987. (Tr. 83–84.) Griego worked Sunday through Wednesday or Sunday through Tuesday on a weekly rotating basis.

When Griego started, there was a message on the grease board asking drivers to stop running over chocks. (GC Exh. 22; Tr. 129.) Lackner also put a message on the grease board telling drivers to fill out their paperwork correctly. Attached to the board was an example of a pre-trip inspection form highlighting certain areas where drivers were not filling it out correctly. The timing of the pre-trip inspection was not noted. (Tr. 530–531, 619.) The messages remained there for a few months. (Tr. 129–133.) Lackner never discussed chocks or paperwork with Griego, and he told Johnson and DeHerrera they were filling out their paperwork correctly. (Tr. 529, 620.)

On July 16, 2012, Lackner sent an email to McNeely telling her that all NBB shuttle drivers had been given their second verbal warning about using and not running over chocks. The email stated that the drivers had been warned that the next time they failed to use chocks or ran them over, they would be written up and lose their safety bonus for the week. Lackner added that he had also "once again" posted this on the safety board for all to read. He said he had done this after the first warning, and had left it posted for 2 months, and would do the same this time. (GC Exh. 9.)

Lackner sent another email to McNealy on July 16 telling her that he had given all NBB shuttle drivers their first verbal warning to fill out pre and post-trip sheets and daily activity sheets completely, with all information such as "name, dates, time, mileage, tractor numbers, trailer number for pre-trip, trailer number for post trip and all other related info." Lackner also noted that he posted this on the safety board. (GC Exh. 9.)

On August 23, 2012, Griego improperly hooked an air line. This caused damage to the tractor, requiring him to take the tractor back to the brewery and use a replacement tractor for his

shift. Pursuant to Lackner's instructions, Greigo made a report. Lackner sent an email to Jennifer Sawyer, with several others copied, including McNealy, explaining what occurred. He relayed that Griego had failed to hook up all the lines to the trailer when he was moving it from one door to another. As a result, the lines fell and were damaged beyond repair, requiring the tractor to need new air lines and some other parts. He conveyed that Griego was losing his safety bonus for the week, the incident would go into his personnel file, and he would receive additional training. (GC Exh. 9.) A week or so later, Griego relayed what happened to someone from Decker's safety department. He was not disciplined for the incident, but he lost a safety bonus for the week.[8]

Toward the end of 2012, the drivers began talking about the fact that Decker did not pay overtime. DeHerrera and Hutchins had previously performed the same job for Kenyon Trucking, who had the NBB contract before Decker, and they were paid overtime with Kenyon. DeHerrera shared this with Griego, and said a lot of the drivers knew that the company that previously had the NBB contract had paid the drivers overtime. (Tr. 33–534.)

F. Incidents Involving Griego in Early 2013

On February 5, 2013, Griego was working the night shift. When he pulled into the res there were some vehicles parked in an area that made it difficult for Griego to pull in. Griego approached the other drivers and asked them to move. One of the drivers, who worked for a company called Gulick, told Griego he was not going to move and he had NBB's permission to park there. Griego told him that was not NBB's policy, and he was not supposed to park there. The other driver got out of the vehicle and chest bumped Griego, repeating he was not going to move his vehicle.

NBB uses Fleming Security at the res. Griego's brother, Leonard Griego (L. Griego), is the security guards' supervisor. Griego called security, who in turn called 9-1-1. A security officer, Mathew Penov, wrote a report stating that he had received a call from Griego at 10:30 p.m. requesting to have a Gullick driver move because he was blocking access to the docks. He received a second call shortly afterward sating that the Gullick driver had attacked Griego. He called 9-1-1 and the police were dispatched. When the police arrived, Penov spoke to both parties and asked the Gullick driver to leave because he was not scheduled to pick up his load until 6 a.m. the following day. The Gullick driver had his on-site sleeping privileges suspended for the night and was told to come back 30 minutes before he was scheduled to pick up his load. (GC Exh. 11.) Later that night, in the drivers' room, Griego told Johnson what had occurred. DeHerrera and driver Eric Merkner were present at the time. (Tr. 155.)

In February 2013, Griego's wages were garnished for back taxes owed to the State of Colorado. He was notified about this by a letter from Lackner. Griego called Decker's human resources office in Fort Dodge and spoke with Nancy Long, who was in charge of payroll. He asked her about the letter and said if it was not a legal document Decker would be liable for anything that was taken out of his check. Long referred Griego to her supervisor, Brad Batey, who was the assistant treasurer. Griego called Batey and left a voicemail, which was transcribed.

[8] Griego was involved in an accident that was determined by the police to be the fault of another driver. He did not lose his safety bonus as a result of this accident.

(Jt. Exh. 1.) Griego and Batey spoke and the conversation was similar to the one between Griego and Long. After the call, Batey called driver services and the matter was referred to Wallace.

Griego then spoke with Wallace and repeated that Decker would be liable if the letter he received was not a legal document. Griego said that Decker was breaking the law and he had an attorney working on the issue. Wallace ended the conversation because he said if Griego had an attorney, then his attorney needed to talk to Decker's legal department. (Tr. 799.) Griego was not disciplined at the time.

G. Drivers' Pursuit of Overtime and Wallace's Visit to NBB

In early March 2013, Griego and DeHerrera discussed getting an attorney to pursue the overtime issue. DeHerrera and Griego each called attorneys from a list DeHerrera had received. They met with Attorney David Miller later that month. Greigo asked Johnson if she would be interested in getting on board if they pursued an overtime claim, and she said she was interested. (Tr. 636, 638.) Griego also told driver Wade Schnabel that he had a lawyer and asked if he wanted to be involved in a lawsuit for overtime pay. Schnabel said he was not in favor of pursuing overtime.

A couple days later, Schnabel asked driver Ron Carvalho if Griego had approached him about a potential lawsuit about overtime pay. Carvalho said he had not been approached. Schnabel told Carvalho that Griego and DeHerrera had approached him. Hutchins separately asked Carvalho if anyone had approached him about a potential lawsuit against Decker for overtime. Hutchins said DeHerrera and Griego had raised the topic with him.

On April 12, 2013, Johnson received an evaluation of her safety and compliance. She received four points, which put her in the highest category of "Preferred Record." (GC Exh. 23.)

On April 29, Carvahlo called Decker's corporate offices and spoke with McNealy. Carvahlo said Schnabel and Hutchins had told him about potential lawsuit against Decker regarding overtime. McNealy asked if Carvalho had been asked to join the lawsuit and he responded that he had not, but told her that Schnabel and Hutchins had been approached. McNealy asked if Carvalho knew who was involved in the lawsuit, and he said Griego and DeHerrera had approached Schnabel and Hutchins, and he suspected Johnson was involved. Carvalho decided to share this information with McNealy because he was concerned NBB would not renew its contract with Decker if drivers started a lawsuit. The call lasted about 5 minutes. McNealy informed Wallace of the call the same day. (Tr. 863.) On April 30, at 8:28 a.m., McNealy also sent an email to Dale Decker stating that she had received a call from Carvalho stating Griego, Johnson, and DeHerrera had gotten an attorney to go after Decker for unpaid overtime. She attached a Department of Labor (DOL) fact sheet in support of Decker's contention that the NBB drivers were not entitled to overtime. She noted that Carvalho also had mentioned that these three employees were not doing pre-trip inspections and Lackner was just letting it go. (Tr. 418–423; GC Exh. 15.)

Wallace traveled on Decker's private jet to Fort Collins the morning of April 30 to speak to the drivers. He did not give Lackner or any of the drivers advanced notice of his arrival.

Wallace claimed the purpose of his trip was to talk to the drivers one-on-one to hear their concerns. He carried his business cards along with the DOL fact sheet. He brought the DOL fact sheet to have on hand if there were any concerns or questions about overtime. (Tr. 800–804.)

Wallace interviewed the drivers and later recounted his recollection of the interviews in a May 3, 2013 memorandum he shared with McNealy, Dale Decker, Owner Don Decker (Dale's father), Vice President of Safety and Compliant Jim Wilkins, and Chief Executive Officer Tim Burns. (GC Exh. 12.)

Wallace interviewed Merkner first.[9] (Tr. 805–806.) By Wallace's report, Merkner reported that he loved his job, but he disliked DeHerrera. Merkner also said he had no problem with the overtime arrangement, and he would be upset if the others "mess[ed] up a good thing." He complained about other drivers who were lazy and "screw" the rest of them. Merkner said there were three "troublemakers" and Lackner knew who they were but would not do anything about it. He also complained that Johnson did not have to rotate shifts like the rest of them and when others covered her shifts, she did not pay them back. Wallace observed that once Merkner knew he had his ear, he "continued to bend it," even hunting Wallace down each time he visited the site. Merkner became more animated about the "troublemakers" and used the "F word" often. (GC Exh. 12.)

Wallace next approached DeHerrera, who was working the day shift. Wallace approached him and introduced himself. DeHerrera recalled Wallace stating he was there about the overtime issue, and that employees had called Decker's main office about it. Wallace explained to DeHerrera that Decker was exempt from paying overtime, and handed him a paper he had in his car on the topic. When asked what he thought about the overtime issue, DeHerrera said that he would be interested in receiving overtime. Wallace asked if DeHerrera knew whether any attorneys were involved. DeHerrera responded that he did not know. He then volunteered that he did have an attorney for a work injury he had sustained to his shoulder.[10] DeHerrera complained that there was favoritism toward Johnson. Before their conversation concluded, Wallace said there was going to be a mandatory meeting for all drivers. (Tr. 556–561, 582.)

Wallace's notes about his interview with DeHerrera started out by stating that he seemed soft-spoken.[11] He recalled DeHerrera stated that Johnson seemed to be favored because she did not have to rotate. Wallace further noted that DeHerrera mentioned his shoulder injury several times, and said he had an attorney working on it. Wallace was "very leery" of DeHerrera's intentions, and perceived he was trying to look for any legal liability against Decker. He complained that Lackner accused him of stealing an air hose they all use. DeHerrera expressed his dislike for Merkner, and stated he uses the "F word, N word and the C word" when talking about Johnson. (GC Exh. 12.)

[9] Wallace did not testify about the contents of this conversation, and Merkner did not testify at the hearing.

[10] DeHerrera perceived that this comment prompted Wallace to believe he had been talking to Griego because DeHerrera had introduced himself as "Joe" to Wallace.

[11] Wallace did not testify about the content of his conversation with DeHerrera.

DeHerrera warned Johnson that Wallace was at NBB asking about overtime and talking to an attorney. She therefore was not surprised when Wallace approached her when she came on shift that evening. A load was waiting for delivery, so Wallace told her to take her load and he would talk to Griego first. Johnson checked the mirrors and the brakes, but did not look under the hood. Merkner, who had driven the truck on the prior shift, had not reported any problems with it so Johnson was satisfied it was safe to operate. (Tr. 641–642.) She did a pre-trip inspection later in her shift. (Tr. 650.) According to Wallace, Johnson hooked up her load and failed to do a pre-trip inspection, even though the load had not been staged. (Wallace 816–817.)

At some point, Griego called Lackner and asked if he knew Wallace was there. Lackner responded that he did not.

Griego was scheduled to start his shift at 5:30 p.m., and he showed up to work at around 5:20 p.m. He usually rode a motorcycle to work, but he had borrowed his brother's truck because a blizzard was forecast. DeHerrera had called Griego at around 4:30 p.m. to warn him that Wallace was there and to see if he needed his shift covered because he knew Griego had vehicle problems. Griego recorded his interaction with Wallace. (GC Exh. 7.)

Wallace approached Griego and introduced himself. After exchanging some pleasantries, Wallace said he was going to try to meet with each of the drivers individually and hold a mandatory meeting with all the drivers before he went back to Iowa. Griego responded by saying, "Alright." Griego then told Wallace not to do it on a snow day, and attempted to explain that he had his brother's truck. Wallace interrupted and said "I'll do it when I do it. It'll be mandatory." Griego said he rode a motorcycle, and Wallace told him he would need to find a different mode of transportation if it snowed because he (Wallace) was only there a short time and if he called a mandatory meeting, it would be mandatory. When Griego said his only mode of transportation was a motorcycle, Wallace said he could give him a ride. Griego responded, "Well that's fucking good. I appreciate that." The two of them went back and forth, with Wallace stating he intended to hold the meeting, and Griego continuing to say he could not get there on his motorcycle if it snowed. Wallace continued to offer Griego a ride. The two spoke over each other with elevated voices. After some conversation, Griego said, No, no, no, no. Don't, don't do this to me." He explained that this was in response to Wallace putting his hand in his face. After more similar banter about the meeting and Griego's transportation, Griego stated, "Well, I'm just letting you know so you don't put your hand in my face."[12] Wallace claimed he put up his hand because Griego was approaching him while raising his voice. (Tr. 809–810.)

After a brief break, the conversation continued. Wallace told Griego there had been some feedback at the corporate office that there were problems, so Wallace wanted to visit with everyone to try to sort things out. Griego started up his tractor to check his gauges and the two discussed how the shifts worked. Griego then started talking about drivers' attitudes, and how some racial and other derogatory comments have occurred and remained unaddressed. Griego also told Wallace that drivers from Werner were getting in the Decker drivers' way at the res.

[12] DeHerrera heard Griego ask Wallace to lower his hand and Wallace saying his hands weren't up (Tr. 565.) At his unemployment compensation hearing, Griego said Wallace did not raise his hand. He explained that he did not remember this until he reviewed the recording. (Tr. 332.)

Wallace asked Griego if he would get a call when he needed to hook up to a load, and Griego responded that he would.

Wallace pressed for detail about his complaints, and Griego said he had heard drivers refer to Johnson as a "cunt" and a "bitch." Wallace asked if these comments took place in front of a supervisor, and Griego responded that they had. Wallace responded that in order for a reprimand to ensue, he would have to hear the comments or have multiple people tell him that a particular employee was making the comments. He proceeded to give an example from a situation that had occurred at another company.

Griego expressed his belief that Lackner had not been proactive enough. He also told Wallace that there were issues with Hydra drivers being in the Decker drivers' way and a couple drivers having face-to-face confrontations with Hydra, and Lackner did not address it when it was brought to his attention.

Wallace said he was in Fort Collins for a short time and he needed to interview everyone and figure out what the problems were within the next 24 hours. Wallace then said one of the things he heard was the drivers were upset about not getting paid overtime. Griego responded that the lack of overtime had been an issue since he worked there and that drivers had talked about it since Decker got the contract with NBB. Wallace asked him if this was true, and Griego affirmed it was. Wallace then asked why the drivers hired on when they knew Decker did not pay overtime. Wallace said Decker was exempt from paying overtime, and told Griego that he had paperwork with him to show this. Griego said he'd heard Wallace was "flashing paper around." Wallace then said if somebody wanted to get an attorney, that was up to them. He said he wanted to clear things up because it seemed like everyone was "pissed" all the time. Griego responded that it was frustrating sometimes to come to work. Wallace replied that there were other jobs out there, and Decker was not a prison. Griego commented, "It is what it is" and Wallace said it looked like a "gravy" job to him, with the rotating schedule of 3 days off one week and 4 days off the next.

The two of them discussed the rotating schedule, and Griego expressed that some of the drivers minded it, but he did not. Wallace said he had heard complaints of favoritism, and Griego mentioned that certain guys made a bigger issue out of it, referencing Merkner in particular. After some more conversation, Wallace asked Griego the one thing he would fix if he could. Griego said he could see where they were coming from with the overtime thing, and he also mentioned 24-hour straight shifts. Wallace asked how shifts needed to be covered, and Griego explained that it was hard to get vacation covered and complained that Lackner did not step up to fill in. Griego mentioned that tempers can get short when issues don't get addressed, and Wallace responded, "Are you short here?" Griego responded that he was just honest, and elaborated on this with an example. Wallace said, "But you don't have a short fuse?" Griego said he did not think he had a short fuse, but he was really ticked off with Wallace being there and with the mandatory meeting. He then went on about issues with Lackner and scheduling him to work during snow storms without checking to see if other drivers were available. They discussed the mandatory meeting once again, in a circular manner, covering the same territory they previously had covered.

At this point, after Wallace and Griego had talked for nearly 30 minutes, Griego got a call on his cell phone telling him a load was ready to go. After hanging up the phone, Griego expressed to Wallace his belief that Lackner was a nice guy, but he was non-confrontational and thought issues would just go away if he did not deal with them. Wallace asked Griego what he would do in Lackner's shoes and whether he would be able to deal with the complaints. Griego responded that he would, but realized that some of the complaints were petty bullshit, and again singled out Eric, who he believed was "just bitching, bitching and bitching and bitching and bitching." Wallace tried to ask what Eric was bitching about, and Griego responded, "Everything," and then elaborated in a long-winded manner. Griego then went back to talking about drivers parking in the wrong place and using inappropriate language. Wallace asked how often the drivers saw Lackner, and Griego responded they rarely saw him. Wallace asked if Griego had been tipped off about his presence, and Griego said he had before he even arrived at work. A short time later, Johnson pulled up and Wallace told Griego he was going to talk with her.

Wallace went to talk to Johnson and Griego started up his truck. There was a period of time when Wallace was unable to see Griego because a trailer was in between them. (Tr. 867.) He hooked up to the trailer, hooked up the electrical lines, turned on the marker lights and hazard lights, looked over the trailer and tires, got the bill of lading from the back of the trailer, and proceeded to the res. He did not inspect the engine compartment because he had been talking to Wallace and was satisfied with the condition of the truck. He did not perform a complete pre-trip inspection prior to leaving for the res. Griego performed a complete pre-trip inspection after his delivery to the res and he turned in a completed pre-trip inspection form at the end of his shift. (Tr. 243–248.)

Wallace's notes from the conversation with Griego reflect that Wallace perceived Griego as "an extreme 'Hot Head.'" He described the conversation about the meeting and said Griego "got in [his] face." Wallace wrote that he later learned Griego had gotten into arguments with NBB staff at the brewery and the res, and that in one case 9-1-1 was called to break up an altercation between Griego and an OTR driver. Wallace could tell that Griego was one of the opponents of Decker's overtime policy. He also perceived him as "the courage and the muscle behind the decisions that the trouble makers pursue." Wallace noted that Griego did not perform a pre-trip inspection and that he later sat on a load the last 45 minutes of his shift. He further noted Griego's dislike for Merkner, and his report that he made rude comments about Johnson. (GC Exh. 12.)

Wallace helped Johnson unhook her truck and said he was going to hold a mandatory meeting with employees the following day. He asked her if she had any concerns, and she replied that she had issues with the trucks not being fixed, Lackner not being around, and problems with Merkner. With regard to Merkner, Johnson told Wallace that he had, behind her back, called her a cunt, a fucking bitch, and a lazy bitch, and Lackner had just laughed about it. Wallace asked if he called her those names directly, and she said no, but he would mutter them and when she asked him to repeat himself, he would refuse. Wallace said he would take these issues back to corporate. (Tr. 643–645, 817–819.)

It started to rain, so they moved into Wallace's car. Wallace said he head drivers were talking to an attorney about overtime and he asked her about it. (Tr. 647.) Wallace denied that

he mentioned rumors about a lawsuit. (Tr. 820.) According to Johnson, Wallace pulled out a piece of paper from a folder on his dashboard, and said interstate truck drivers were not entitled to overtime. He said they had a lot of attorneys look into it, they did not owe overtime, and if anybody got an attorney, Decker would fight it and win. (Tr. 644–647.) According to Wallace, Johnson told him she wished the drivers could get overtime but she had no problem with the overtime issue. (Tr. 820.)

According to Johnson, Wallace also said that he saw that she and Griego had not done pre-trip inspections, but he realized his presence may have thrown things off so he did not intend to write them up. (Tr. 647–648.) Wallace recalled pointing out that she had not done a pre-trip inspection. (Tr. 870.) At that point, Lackner came to the window and started talking to Wallace. (Tr. 680.) Wallace did not ask Johnson if she had talked to anyone about overtime pay, and Johnson did not tell Wallace she and other drivers had talked about retaining an attorney to look into overtime pay. (Tr. 687–688.)

Per Wallace's notes, he perceived Johnson as nervous at first, and noted that Merkner was her main concern. She said that he mumbled bad things about her. She expressed that Merkner had anger issues and said she did not feel safe working with him. She also said other drivers had heard Merkner talk badly about her and had told her about it. Wallace noted that when asked about the overtime situation, Johnson said she would like to get overtime but it wasn't a big deal to her.[13] She expressed that she loved her job and would not want to lose it. They talked a bit more about why Decker was exempt from overtime and she seemed interested. Wallace concluded by stating, "I know she is one of the 3 pushing this and I do not trust her. I also witnessed her NOT performing a pre-trip inspection." (GC Exh. 12.)

The evening of April 30, Wallace met Merkner, Carvalho, and Schnabel at the Wellington Grill for dinner. Merkner texted Carvalho that Wallace wanted to talk about Lackner and the overtime policy. (Tr. 427.) Toward the beginning, they discussed overtime. Wallace had the DOL fact sheet with him. (GC Exh. 15 pp. 2–3.) When Wallace tried to show them the document, they said they knew they were not entitled to overtime. Wallace said he was making the sheet available to everybody and asked if they had any questions about it. (Tr. 431–432).

They also discussed Lackner's unavailability at the worksite and his failure to purchase supplies and make repairs in a timely manner. Schnabel complained that Lackner did not cover shifts when an employee needed a day off. He also expressed his belief that Johnson received favoritism because she was not required to rotate shifts. Toward the end of dinner, Carvalho asked if Wallace had been notified about a physical altercation between Griego and an over-the-road driver . Carvalho told Wallace he did not witness the event and did not think he mentioned who the aggressor was. He mentioned that Griego had said the supervisor at NBB called 9-1-1. Wallace "tried to delve into it" but all Carvalho could report was what he heard Griego tell Lackner. (Tr. 436.) Schnabel recalled that Griego told him and Carvalho about the incident, and Lackner was not present. He conveyed to Wallace that he learned about the incident "by hearsay." (Tr. 499–500.) Schnabel also said that Griego was a disgruntled employee, and referred to him as a "hothead."[14] Merkner and Wallace had dinner, and the others just had

[13] In his affidavit, Wallace stated he and Johnson did not discuss overtime pay. (Tr. 857.)

[14] Schnabel said he never witnessed any incidents of Griego getting angry at work. (Tr. 507.)

drinks. Merckner, Schnabel and Carvalho were not paid for their time at the dinner, but Wallace paid the bill.

With regard to Carvalho, Wallace's notes stated that he was eager to share his issues, all of which were centered around Lackner's lack of leadership. He complained mostly about Lackner not taking care of the equipment when they reported something was wrong, and his failure to keep supplies on hand. He also complained that Lackner provided no help covering their shifts and just left it to the drivers. Wallace perceived he was not a fan of the "three trouble makers," Johnson, DeHerrera and Griego. Carvalho expressed that he loved his job and would be very upset if the others "messed things up" for them. He had no issues with overtime. (GC Exh. 7.)

Wallace's notes reflect that Schnable was very quiet and had little to say. His main complaint was that Johnson was favored and Lackner should step in to cover shifts. He had no issues with the overtime situation. (GC Exh. 12.)

The morning of May 1, Griego finished delivering his last load at 4:30 a.m. He completed his post-trip inspection and other paperwork, and got things ready for the next driver. According to Griego, at about 5:30 a.m., he and Johnson then went to the drivers' room to deposit their paperwork. Johnson recalled that she got out of her truck at about 5:20 a.m. and went into the break room. Neither Griego nor Johnson received any calls during this time period. (Tr. 249, 52–653.) Griego was there and they stayed until they clocked out at 5:45 a.m. Wallace came into the drivers' room and introduced himself to Hutchins, who was just coming on his shift. Griego and Johnson clocked out at 5:45 a.m.

Wallace came into the break room at around 5:25 or 5:30 a.m. and Hutchins came in about 5 minutes later. Wallace introduced himself to Hutchins and said he was there to talk to the drivers. Johnson did not see Lackner on the premises during this time period. (Tr. 654–655.)

Wallace initially testified he got to the brewery at 5 a.m., but when confronted with his affidavit on cross-examination, testified he arrived at the brewery a few minutes after 5 a.m. (Tr. 873–874.) He saw that the truck Griego drove was hooked to a trailer, pulled out of the dock, and running. As Wallace was walking toward the drivers' room, Griego was coming out, so he let Wallace in and proceeded toward his truck. Lackner then came into the drivers' room and asked how long Griego had been sitting outside. Wallace responded that Griego had been there since 5 a.m. and Lackner said Griego knew better and he was going to talk to him. Wallace went outside to look for a shovel because it had been snowing. When he came back in the drivers' lounge at about 5:25 a.m., Johnson and Griego were there. Driver Allen Gerstner came on shift and took the load that Griego had staged. (Tr. 813–816.) Wallace did not take any action against Griego, and left the matter up to Lackner. (Tr. 877.)

Later in the morning, Wallace met with Allen Gerstner. According to Wallace's notes, Gerstner loved his job, and his only complaint was that Johnson was not required to rotate shifts like the other drivers. The overtime arrangement was fine with him. He did not mention anything about Merkner's language or behavior. (GC Exh. 7.)

Wallace also met with Stewart Hutchins. He reported that Hutchins was very concerned the others were going to "mess up a good thing." He said he was approached by DeHerrera to join him in getting an attorney for the overtime situation, but he told DeHerrera he was not interested and, again, they were "messing with a good thing." According to Wallace's report, Hutchins loved his job and liked the time off they got. He did not have any concerns about Johnson not rotating shifts. He was the only driver who praised Lackner, stating he did a good job. Hutchins did not mention Merkner's language or behavior. (GC Exh. 7.)

Wallace met with Lackner at a Denny's restaurant later that morning to discuss what he had learned from the drivers. (Tr. 823.)

Wallace did not hold the mandatory meeting. He explained that his findings were centered around Lackner's poor performance, and he did not feel it was appropriate to discuss that among the employees he supervised. (Tr. 847.)

H. Response to Visit and Disciplinary Actions

On May 2, Wallace sent a memorandum about his visit to Fort Collins to McNealy, Dale Decker, Don Decker, Wilkins, and Burns. In the introductory paragraph, Wallace wrote, "On April 29, we received an anonymous call from one of the Shuttle drivers tipping us off that 3 of the other drivers were trying to get them all together to 'come after Decker' for unpaid overtime." He then said that after his visit, he "learned there is a lot more going on there than we knew about," and summarized his findings. (GC Exh. 17.) He also circulated his May 3 summary of his interviews with the drivers, described above.

The group met on May 3 to discuss whether to discipline any NBB employees. They determined that Merkner would be written up for his language about Johnson. They also switched his shift so he and Johnson would not see each other. They decided to write Johnson up for failing to conduct a pre-trip inspection, and terminate Griego. In making these determinations, Wallace considered that all employees had received verbal warnings for not doing pre-trip inspections at the beginning of their shifts and for failing to use chocks. Wallace believed that Johnson also had another warning for failing to do a pre-trip inspection. He also considered Griego's previous accident for failing to hook up air lines properly. (Tr. 824–827.)

On May 6, Wallace came to Fort Collins to administer discipline. Todd Donnelly, who runs a loading service for Decker in Fort Dodge, accompanied Wallace to Fort Collins. (Tr. 831–832, 844.) McNealy and Dale Decker also came and, as a team, they administered the discipline. They did not schedule meetings with the drivers, but instead planned to meet with them individually in the drivers' room when they arrived for their respective shifts. (Tr. 828.)

At around noon on May 6, Wallace and McNealy disciplined Lackner at the same restaurant where they had met on May 1. (Tr. 828, 844.) Lackner was given a written warning dated May 6, 2013, setting forth the deficiencies drivers had reported to Wallace. Specifically, he was informed that drivers seldom saw him, when they called him to discuss issues, their concerns went unaddressed, he ignored subpar performance to avoid confrontation, he did not follow up to ensure his messages on the white board were addressed, he did not cover shifts proactively when drivers called in or needed a day off, he acknowledged racial or sexual

comments were made but he did not report them to HR, and he did not keep supplies on hand. Lackner was notified that he needed to immediately change his behavior and that his employment was in jeopardy. Finally, he was notified that Decker's progressive discipline policy would apply to any further incidents, up to and including termination. Lackner signed the document.[15] He was also given a performance improvement plan (PIP) spelling out in detail how he was expected to improve. Lackner signed his PIP on May 6. (GC Exh. 16.)

Wallace asked Carvalho, who was partnered with Schnabel, if he would mind switching partners. Carvalho said he would work with anyone other than Griego because he viewed him as a "hothead." Merkner started working with Carvalho. At around noon, Schnabel met with Wallace, Dale Decker, and McNealy. Wallace asked Schnabel if he would switch shifts to work the other half of the week, and he agreed. Schnabel also said Griego had approached him and said he had a lawsuit for overtime. (Tr. 482–484.)

Merkner was the first driver the management team met with in the drivers' room. (Tr. 828.) He received a letter of warning and was notified he was being moved to a different shift. The letter of warning, dated May 6, cited to profane language toward coworkers constituting harassment. Merkner was informed that his conduct violated company personnel policy sections 501 and 504,[16] and was reminded of Decker's zero-tolerance standard for harassment or discrimination. The letter concluded by informing Merkner that his employment was in jeopardy, and any further violations of company policy and procedure would result in termination. (GC Exh. 18.)

While Mernker was in the drivers' room Griego came to work and encountered Wallace, who had stepped outside when he heard Griego's motorcycle. Wallace told Griego to wait, because they were talking to another employee in the drivers' room, but Griego walked past Wallace and went into the drivers' room. Wallace and Donnelly, who had been waiting by the entrance, followed Griego. Wallace told Griego it was not necessary for him to clock in because he was being terminated. According to Griego, when Griego asked why, Wallace responded "Just cause." When he asked Wallace to elaborate, he said, "Just 'cause I can." (Tr. 255.) Wallace recalled saying Griego was terminated "for just cause." Griego asked if he was being terminated because of his race, and McNeely responded that race was not the reason. (Tr. 834.) Griego handed over his key card and left the room. He did not receive a termination letter or other paperwork at the time. Griego had not received written discipline nor did anyone speak to him about his performance prior to his termination.

At the hearing, Wallace said his reasons for terminating Griego were his volatile and aggressive behavior toward him, the incident when 9-1-1 was called, failure to do a pre-trip inspection, and sitting on a load for more than 45 minutes. He also looked at Griego's personnel file, including the garnishment issue, and considered that Griego had been employed for less than a year. (Tr. 835–836.)

Johnson arrived at work at 5:30 a.m. on May 6. While she was going to clock in, Wallace stopped her and said they were talking to Eric and she needed to wait a few minutes.

[15] He dated it May 5, but this is apparently an error.

[16] This appears to be a typo, and should be sections 501 and 503.

(Tr. 656, 841.) Griego came out and told her he had been fired. When she asked why, he said would not give a reason. Johnson went into the break room where Wallace and McNealy were waiting along with two men she did not recognize. McNealy said Merkner had been written up and moved to a different shift. Wallace also informed her she was being written up for failure to do a pre-trip inspection, and informed her that Lackner reported that she never did pre-trip inspections. Johnson asked how Lackner would have known if she had done a pre-trip inspection because she had not seen him for the past 2 months. Wallace approached her and responded, "Jennifer, we took your issues back to corporate and we took care of those issues." Johnson was intimidated so she did not say anything else. (Tr. 657–658.) She did not mention that Lackner had permitted the drivers to do pre-trip inspections later in their shifts. (Tr. 843.)

The letter of warning stated that Johnson had failed to complete a pre-trip inspection during Wallace's recent trip to NBB. It also stated that Lackner had given verbal warnings to all shuttle drivers on July 16, 2012, regarding filling out all paperwork completely, including pre-trip inspections. The letter stated that Johnson's actions were in direct violation of company policy and FMCSA regulations. Specifically, the letter said Johnson violated "Section 501" of Decker's personnel policies entitled "Employee Conduct and Work Rules." It further stated, "It is not possible to list all forms of behavior that are considered unacceptable in the workplace; however, insubordination is specifically noted." The letter concluded by warning Johnson that she needed to change her behavior immediately, her employment was in jeopardy, and further violations of company policies or procedure would result in application of Decker's progressive discipline policy, up to and including termination. (GC Exh. 21.) Johnson signed the letter and went to her truck. (Tr. 660.)

Johnson had previously received two verbal warnings during her first year of employment. A letter dated July 1, 2011, was addressed to Johnson and signed by Keith Lamfers, the director of safety and compliance. The letter referenced a motorist's complaint about Johnson at the corner of Interstate 25 and Vine. It warned that further performance issues of company policy violations could result in further discipline, up to and including termination. (R Exh. 8.) Johnson did not recall receiving the letter. (Tr. 674.)

Griego filed for unemployment compensation through the Colorado Department of Labor and Employment. In preparation for Griego's unemployment compensation appeal hearing, Decker provided a letter dated July 23, 2013, with some documents attached. The letter stated that Griego was discharged "for misconduct in that he had unsatisfactory job performance, a pattern of confrontational behavior, and multiple company policy violations." (GC Exh. 9.) The letter stated that on July 16, 2012, Griego had received a verbal warning regarding filling out all paperwork completely, and a second verbal warning about using chocks and not running them over. The letter also outlined the incident where Griego failed to hook up the lines to the trailer, resulting in damage to the tractor. In addition, the letter stated that Griego was confrontational with Wallace on May 1, and Wallace had also learned that Griego had arguments with NBB staff, one of which resulted in the police being called. This same day, Wallace had witnessed Griego failing to complete a pre-trip inspection and sitting on a load for 45 minutes.

A May 7, 2013 termination letter signed by McNeely was attached to the July 23 letter. The letter confirmed Griego's termination on May 6, for unsatisfactory job performance. The letter went on to explain when his benefits would terminate and the time window for picking up

any personal property. Griego had not previously seen the termination letter. (Tr. 286–288.) Wallace did not recall seeing the termination letter prior to meeting with Griego to terminate him, and did not know whether it had been drafted prior to the meeting. (Tr. 884.)

When Decker terminates a driver, it fills out a Driver-a-Check (DAC) report which is entered into a nationwide database permitting potential employers to research drivers. Decker did not report on the DAC form that Griego had been disciplined and terminated for just cause. (Tr. 899.) Decker's DAC report for Griego reflected his work record was satisfactory, and the boxes that would indicate a "log violation" and/or "company policy violation" were not checked. (GC Exh. 10.)

Miller first contacted Decker on May 30, 2013, to inform them that he represented Scott Johnson, Joe Cypress, Tom Lark, Jennifer Johnson, DeHerrera, and "Joe Garcia" (a mistake for Griego) in a lawsuit pursuant to the FLSA. (R Exh. 15; Tr. 761.)

I. Service of Subpoena on Jennifer Johnson

On March 31, 2014, Johnson was served with a subpoena duces tecum at NBB. (GC Exh. 23; Tr. 668–669.) Subpoena B–727540 requested that Johnson provide all documents from January 1, 2013, to the present, relating to: (1) all documents relating to any she had with the NLRB concerning this case and the FLSA case; (2) all documents relating to any communications she had with Charging Party Miller concerning this case and the FLSA case; (3) all documents relating to any communications she had with current and former Decker employees regarding this case and the FLSA case; (4) all documents she had circulated, distributed or provided to any current or former Decker employee concerning this case and the FLSA case; (5) any and all documents related to her discipline at Decker; and (6) any and all documents relating to the discipline or discharge of any current and former Decker employee that she had reviewed, seen, or discussed with the Charging Party and/or current and former Decker employees.

"This case" was defined as Case 27–CA–107239. The NLRB was defined as "Region 27 of the National Labor Relations Board, the National Labor Relations Board, its officers, agents, and assigns." The FLSA case is defined, by citation, as the class action lawsuit for unpaid overtime Miller filed in U.S. District Court for the District of Colorado on September 18, 2013. The term "document" is broadly defined, and does not exclude an affidavit given to a Board agent during the investigation of an unfair labor practice charge. (GC Exh. 24.)

III. Decision and Analysis

A. Credibility Legal Standards and General Findings

A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or

admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op at 7 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

The General Counsel has requested that I draw an adverse inference based on the Respondent's failure to call Lackner as a witness. The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). As the only onsite supervisor with authority over the drivers at NBB, he is the only person capable of responding to many of the relevant facts concerning the drivers. I find, under the circumstances present here, that an adverse inference is appropriate. As such, where Lackner would have been assumed to testify about an asserted fact, I will presume his testimony would be adverse to the Respondent and favorable to the General Counsel. These instances are pointed out specifically below.

Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below. My general observation, however, was that Jennifer Johnson was extremely forthright, honest, and thoughtful when she testified.[17] She did not appear to be embellishing her testimony, and was forthcoming about the fact that she did not perform a pre-trip inspection prior to taking her first load on April 30. JR DeHerrera was not the most articulate witness, but I did not find this to be indicative of credibility. His testimony was consistent with other witness' testimony and with the relevant events that were unfolding. As current employee testifying against their own pecuniary interests, I find their testimony to be particularly reliable *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).

With regard to Griego, I find he was generally credible and forthright when he testified, though he at times conformed his testimony to further his self-interest, such as his description of of a "staged" load. While much of Wallace's testimony is not disputed, it is clear he tried to minimize key aspects of the case that would be harmful to the Respondent. These are discussed below.

Finally, with respect to the tape recorded conversation between Griego and Wallace, I of course credit and give more weight to the recorded conversation itself as opposed to either witness' recollection of it.

[17] The Respondent points to inconsistency in that Johnson testified that pre-trip inspections were not covered during Decker's orientation, but the evidence shows they were. I do not find this single minor anomaly detracts from her credibility regarding the material events in this case. See *Doral Building Services*, 273 NLRB 454 (1984).

B. Protected Concerted Activity

Because many of the complaint allegations concern the drivers' protected concerted activity, I will begin by addressing this threshold issue.

The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). "[D]iscussion of wages is protected concerted activity because wages are a 'vital term and condition of employment,' 'probably the most critical element in employment,' and 'the grist on which concerted activity feeds.'" *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995)(footnotes and internal citations omitted); See also *Automatic Screw Products Co*., 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); *Tortillas Don Chavas*, 361 NLRB No. 10 (2014). "The requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7." *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 4 (2014).

The record in the instant case clearly establishes that employees regularly discussed wages, and in particular the fact that they were not paid overtime, during the relevant time period. By April 30, as detailed above, DeHerrera and Griego had both approached other employees to see if they wanted to join them in a lawsuit against Decker for overtime. There can be no doubt whatsoever that this constituted protected concerted activity.

C. Alleged Interrogations

1. Brenda McNealy

Complaint paragraphs 4 and 9 allege that, on about April 30, 2013, Brenda McNealey, over the telephone, interrogated employees about their protected concerted activities and the protected activities of other employees, in violation of Section 8(a)(1) of the Act. The General Counsel bears the burden to prove a violation of Section 8(a)(1) by preponderant evidence.

The evidence is undisputed that on April 29, Carvalho called McNealy to report that some employees were discussing a potential lawsuit for unpaid overtime, and that when McNealy asked who was involved, Carvalho told her what he knew and what he suspected. As discussed directly above, the questions McNealy posed related to employees' protected concerted activities.

In assessing the lawfulness of an interrogation under Section 8(a)(1), the Board applies the "totality of circumstances" test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). "A violation will be found when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with employees in the exercise of the rights guaranteed them by the Act." *Liquitaine Corp.*, 298 NLRB 292 (1990.) See also *John W. Hancock, Jr., Inc*., 337 NLRB 1223,

1224 (2002). The Board applies an objective standard to this examination. The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992). Instead, the key consideration is whether the employer's actions would coerce a reasonable employee. *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981); *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

In analyzing the totality of the circumstances, relevant factors include "whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation." *Bridgestone/Firestone, Inc.,* 335 NLRB 941 (2001), citing *Stoody Co.*, 320 NLRB 18, 18–19 (1995); *Rossmore House*, supra at 1178. These factors "are not to be mechanically applied"; they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, supra, fn. 20. Another factor to consider is whether the employer had a valid purpose for obtaining the information sought about the protected concerted activities. *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923 (5th Cir. 1993).

As to the nature of the information sought, the relevant consideration is whether the question appeared to be designed to obtain "information upon which to take action against individual employees." *John W. Hancock*, supra. See also *SAIA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001) (interrogations that constitute "a pointed attempt to ascertain the extent of the employees' union activities" are unlawful). Here, McNealy asked Carvalho if he had been approached about the lawsuit and if he knew who was involved in the lawsuit. These questions were a pointed attempt to ascertain which drivers were engaging in the protected concerted activity of discussing a potential lawsuit for overtime. See *Club Monte Carlo Corp*., 280 NLRB 257 (1986)(questions about protected activity leader's identity unlawful). At the time, the lawsuit had not been filed, and Griego, DeHerrera, and Johnson had not disclosed their conversations about the potential lawsuit to management. Accordingly, this factor weighs in the General Counsel's favor.

The questioner, McNealy, was a high-ranking official from the Respondent's corporate office. This weighs in the General Counsel's favor. The place and method of interrogation consisted of a phone call from Carvalho to McNealy, wherein he voluntarily disclosed that some employees were considering suing Decker for unpaid overtime. Carvalho, for reasons related only to his self-interest, did not mind telling McNealy what he knew. He liked that they got paid when the brewery was shut down, and he was concerned that a lawsuit for overtime would jeopardize this arrangement as well as the contract between Decker and NBB. This factor weighs in the Respondent's favor.

McNealy did not give assurances to Carvalho that the inquiry was benign or that his response would not result in adverse consequences for Griego, DeHerrera, or Johnson. The context here, where the individual being questioned initiated the conversation and had incentive to disclose the names of the individuals engaged in protected activity, does not lend itself to the usual analysis regarding this factor. Normally, the failure to give assurances would weigh against the Respondent. The factual context here renders it neutral.

Finally, the Respondent did not present evidence of a valid reason for McNealy to try to determine the identity of the individuals involved in the lawsuit, and no such legitimate reason is fathomable. Considering the totality of the circumstances, it is clear the questions McNealy posed to Carvalho "were designed to elicit information concerning his and others protected/concerted activity," and therefore violated Section 8(a)(1) of the Act. *Hawaii Tribune Herald*, 356 NLRB No. 63, slip op. at 1, 27 (2011).

The Respondent cites to *Heartshare Human Services of NY*, to support its position that there was no interrogation. In *Heartshare*, an employee reported that an individual named "Shirley" had approached him and asked questions about the respondent's wages and working conditions. The facility's program director asked the employee for a description of Shirley, and the employee complied with the request. The Board noted that the conversation came about because the employee had voluntarily shared with management her encounter with Shirley. The Board emphasized that the questions "did not concern the employees' union sympathies or activities, but instead were limited to entirely neutral matters, such as Shirley's physical description." Moreover, the program director did not inquire into the substance of the employee's conversation with Shirley.

The Respondent also cites to *Wal-Mart Stores, Inc*., 341 NLRB 796 (2004), where the Board adopted the administrative law judge's dismissal of complaint allegations that an employee who initiated a meeting and, both on his own and in response to questions, voluntarily disclosed certain information about union activity was interrogated. The General Counsel did not file exceptions, however, so the Board was not asked to review the administrative law judge's findings. Id. at fn 2.

I agree with the Respondent that the question McNealy asked was a somewhat natural follow-up to the information Carvalho volunteered. That is not the standard by which I am bound, however, and as the vice president of human resources, McNealy's questions cannot be considered merely casual conversation. A reasonable employee would view this inquiry as an attempt to discern who was engaging in this protected activity and, in light of the fact that no legitimate purpose for this was offered, to use it against those individuals. Based on the foregoing, I find McNealy's questions constituted an unlawful interrogation.

2. Lonnie Wallace

Complaint paragraphs 6 and 9 allege that, on or about May 1, 2013, Wallace interrogated its employees about their protected activities and the protected activities of other employees.[18]

a. JR DeHerrera

The General Counsel asserts that Wallace interrogated DeHerrera about his protected concerted activities during their discussion of overtime at NBB on or around May 1.

[18] The employees were not named in the complaint. The General Counsel presents argument regarding DeHerrera and Griego. I therefore will address whether these employees were interrogated, and, for purposes of this decision, presume there are no allegations with regard to other employees.

DeHerrera provided unrefuted testimony that during his visit to NBB, Wallace approached him and introduced himself, and said he was there about the overtime issue. Wallace asked DeHerrera what he thought about the overtime issue and if he knew whether attorneys were involved. Wallace said he would like to receive overtime and he was not sure if attorneys were involved.

Though Wallace's after-the-fact notes do not reflect discussion about overtime, he did not provide testimony to rebut DeHerrera's account of the conversation. It is apparent that the notes do not reflect everything Wallace said, given his testimony that he raised the overtime issue with all employees he spoke with during his onsite interviews. (Tr. 820.) Though the content of the conversations Wallace had with employees was broader than overtime, it is abundantly clear the primary purpose of the visit was to follow up on Carvalho's call to McNealy about three drivers who "were trying to get them all together to 'come after Decker' for unpaid overtime." (GC Exh. 17.) Wallace's May 2 memo to senior management says as much. DeHerrera had previously been identified as one of the three employees. Finally, Wallace admitted he was "very leery" of DeHerrera's intentions, and perceived he was looking for "any legal liability" against Decker. There is no question that Wallace asked DeHerrera about overtime, and I credit DeHerrera's unrefuted testimony that he queried the extent of his knowledge about a lawsuit.[19]

Considering the totality of the circumstances, and applying the factors set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), I find the questions amounted to an unlawful interrogation. *Bourne* sets forth the following factors as relevant to consider: (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against protected concerted activity; (2) the nature of the information sought; (3) the identity of the interrogator, *i.e*., his or her placement in the respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005). The Board also considers timing as a relevant factor. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), *enfd. as modified on other grounds* 115 F.3d 636 (9th Cir. 1997); *Blue Flash Express*, 109 NLRB 591 (1954). Some of the factors are the same as those used to analyze McNealy's questions to Carvalho, while others are different. This is because certain factors are better suited to address the situation between Wallace and DeHerrera, where the individual being questioned about the protected activity was actually engaged in the protected activity.

As noted above, there was no evidence presented to show Decker had a history of hostility toward protected activity. This weighs in the Respondent's favor. The nature of the information sought was DeHerrera's view on receiving overtime and whether or not he knew if attorneys had been contacted. This lies at the heart of DeHerrera's protected concerted activity and weighs in the General Counsel's favor. The identity of the interrogator was a high-level executive who had traveled from corporate headquarters, introduced himself as a vice president of the Company, and was rarely seen at NBB. DeHerrera had in fact never met Wallace before. This weighs in the General Counsel's favor. See *Metro One Loss Prevention Services Group*,

[19] Though, at the time of the hearing, DeHerrera had been off work on workers' compensation for an extended time period, he was still an employee testifying against his current employer. This enhances his credibility, as detailed in the discussion of Johnson's discipline, infra.

356 NLRB No. 20, slip op at 1 (2010)("[C]oercive impact was undoubtedly heightened by the unusual nature" of the manager's visit").

The place of the interrogation was the employees' regular worksite and the method was unscheduled interviews during the employees' regular work hours. They were on the clock and asked by someone high up in Decker's hierarchy to participate in his investigation. This weighs in the General Counsel's favor. As to the truthfulness of the response, it is clear DeHerrera did not want Wallace to perceive him as an instigator because he answered he did not know if attorneys were involved when in fact he and Griego had already consulted Miller. Moreover, the timing of the interrogation, shortly after DeHerrera's consultation with Miller and his discussions with coworkers about joining a potential lawsuit, and the day after Carvalho's call, adds to the coerciveness.

Accordingly, I find the Respondent violated Section 8(a)(1) when Wallace interrogated DeHerrera on April 30.

b. Joseph Griego

With regard to Griego, Wallace repeatedly asked him what his specific concerns were, and Griego told him about different concerns, such as Merkner using foul terms against Johnson, and drivers from different companies getting in the NBB drivers' way at the res. Wallace then initiated the topic of overtime, stating that he had heard that drivers were upset about not getting overtime. This was clearly intended to elicit a response from Griego, which it did. It also prompted Wallace to ask Griego to affirm how long the employees had been talking about overtime pay.

Applying the same factors as applied for Wallace's conversations with DeHerrera, and considering the totality of the circumstances, I find that Wallace interrogated Griego in violation of Section 8(a)(1). Though not asked as explicitly as with DeHerrera, it is clear the nature of the information Wallace sought from Griego was his view on Decker's overtime policy. This is reflected in Wallace's notes, where he stated, "I could tell that Joe was one of the opponents of our OT policy." (GC Exh. 12.) After bringing up the topic of overtime, Wallace continued to talk about it, and referenced the paperwork he had with him to show that Decker was exempt from paying overtime. Though Griego responded truthfully to Wallace's question about the timing of the protected concerted activity, I find the other factors, discussed in full above and equally applicable here, satisfy the General Counsel's burden of proof.

The Respondent cites to *Sunnyvale Med. Clinic*, 277 NLRB 1217 (1985), to support the contention that "friendly" and "casual" conversations with employees do not constitute unlawful interrogations. That case involved a conversation between an employee and her personnel director to whom she was presenting a union dues check-off card. The employee initiated the meeting as well as the topic of the union, and was on a friendly basis with the personnel director. By contrast, neither DeHerrera nor Griego were on a friendly basis with Wallace, and his site visit was their first introduction to him. Moreover, neither employee had disclosed their

concerted activity to management. These distinctions as well as other factual differences between *Sunnyvale Med. Clinic* and the instant case render it unpersuasive.

D. Alleged Threat

Complaint paragraphs 5 and 9 allege that on or about May 1, 2013, Wallace threatened its employees with discharge if they complained about the Respondent not paying its employees overtime pay. More specifically, the General Counsel asserts that Wallace impliedly threatened Griego

The test to determine whether a remark rises to the level of a threat is "whether a remark can reasonably be interpreted by an employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). As with interrogations, the test objective one which examines whether the employer's actions would tend to coerce a reasonable employee. The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

In the instant case, after Wallace told Griego he had heard drivers were upset about not getting overtime, the following exchange ensued:

> MR. GRIEGO: Well, that's been an issue since I got here.
>
> MR. WALLACE: Okay. Why did they hire on? I mean, people -- people knew when they hired on that we don't pay overtime.

(Tr. 210).

After Griego reiterated that the drivers had been talking about overtime since he started at Decker, Wallace stated, "I mean, if somebody wants to get an attorney and do whatever, I mean, that's up to them." (Tr. 212.) A short time later, the following conversation ensued:

> MR. GRIEGO: But that's -- you know, but like I said, I was just telling you that that was -- that was the conversation when I got here, and from what I understand, it was the conversation prior to, I guess, when you guys had the contract. I don't know. That's -- so I was just telling.
>
> MR. WALLACE: Yeah.
>
> MR. GRIEGO: It goes back that far, so –
>
> MR. WALLACE: I want to clear it up if it's talk, because -- because all it ends up is being like, just -- it just seems like being where everybody's pissed all the time.
>
> MR. GRIEGO: Well, it's -- yeah. I understand that, you know. It's kind of frustrating sometimes to even come here.

> MR. WALLACE: Well, (indiscernible) if people don't like it, there's other jobs. This isn't a prison, you know?
>
> MR. GRIEGO: Oh, I understand that, but it -- you know, it's -- I guess, probably some guys with the way things are right now, it's just what it is. You know, it is what it is.
>
> MR. WALLACE: It looks like a pretty gravy job to me.
>
> MR. GRIEGO: Well, actually –
>
> MR. WALLACE: I mean, to have three off one week and four the next.

(Tr. 213.)

In *McDaniel Ford, Inc*., 322 NLRB 956, 956 fn. 1 and 962 (1997), the Board approved the administrative law judge's finding that:

> It is well settled that an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that support for their union or engaging in other concerted activities and their continued employment are not compatible, and implicitly threaten discharge of the employees involved.

(citing *Stoody Co*., 312 NLRB 1175, 1181 (1993), *Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989), and *L.A. Baker Electric*, 265 NLRB 1579, 1580 (1983)). See also *Jupiter Medical Center Pavilion,* 346 NLRB 650, 651 (2006) (employer's statement that, if employee was unhappy, "[m]aybe this isn't the place for you . . . there are a lot of jobs out there" was implied threat of discharge); *Paper Mart*, 319 NLRB 9 (1995) (president's statement that if employee "was not happy he could seek employment elsewhere" was implicit threat of discharge); *Intertherm, Inc*., 235 NLRB 693, 693 fn. 6 (1978) (implied threat to tell employee that if "he was not happy with the Company he should look elsewhere for a job") enfd. in relevant part 596 F.2d 267 (8th Cir. 1979); *Chinese Daily News*, 346 NLRB 906, 906 (2006) (implied threat telling employee to resign if she was not happy with her job), enfd. 224 Fed.Appx. 6 (D.C. Cir. 2007).

Considering that these comments occurred following Wallace's initiation of the topic of overtime, along with other coercive factors discussed above, I find they constituted an implied threat.

The Respondent cites to Griego's testimony that Wallace did not make threats against employees who complained about overtime pay. (Tr. 342.) As noted above, however, the standard is objective. Moreover, I construed Griego's testimony about whether he was threatened as that of a layperson unfamiliar with the Board's definition, and note he was not asked if he thought a threat was implied.[20]

[20] In this regard, I overruled the General Counsel's objection that the question of whether Griego was threatened called for a legal conclusion, as I did not intend to attribute the requisite knowledge of the

The Respondent also asserts that the statements I have found to constitute an implied threat are attenuated from the topic of protected activity. This is simply not the case. Though Griego and Wallace talked about a number of things, the statements at issue occurred on the heels of talking about employees' discussions regarding overtime.

Accordingly, I find the General Counsel has met its burden to prove that Wallace impliedly threatened Griego as alleged, in violation of Section 8(a)(1).

E. Adverse Employment Actions

Complaint paragraphs 7–9 allege that, on May 6, the Respondent disciplined Jennifer Johnson and terminated Joseph Griego because of their protected concerted activities.

To prove an adverse action violates Section 8(a)(1), the General Counsel must make an initial showing that an employee's protected conduct was a motivating factor in an employer's decision to take adverse action against the employee. *Wright Line*, 251 NLRB 1083, 1089 (1980); *Williamette Industries*, 341 NLRB 560, 562 (2004). This is commonly accomplished by showing protected concerted activity by the employee(s), the employer's knowledge of that activity, and animus by the employer. *Meyers Industries*, 268 NLRB 493, 497 (1984); *Grand Canyon University*, 359 NLRB No. 164 (2013); *Hitachi Capital America Corp*., 361 NLRB No. 9 (2014). If the Acting General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra; see also *Signature Flight Support,* 333 NRLB 1250 (2001) (applying *Wright Line* in context of discharge for protected concerted activity). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade by a preponderance of the evidence that the action would have taken place absent the protected activity. *Dentech Corp*., 294 NLRB 924, 956 (1989).

As set forth above, it is clear Johnson and Griego had engaged in protected concerted activity regarding overtime pay about which Decker was aware. The Respondent asserts that Decker did not have knowledge of their protected activity because Carvalho reported only "rumors" and Decker had no basis of knowing who may have been involved in the potential lawsuit. This argument does not even come close to having merit. Carvalho disclosed to McNealy that DeHerrera and Griego had tried to enlist other employees to join them in a lawsuit for unpaid overtime and he suspected Johnson was involved. McNealy's email to Dale Decker specifically states that Griego, DeHerrera, and Johnson were going after Decker for unpaid overtime. (GC Exh. 15.) Moreover, Wallace identified these same individuals as "trouble makers" and thought Griego was "the courage and the muscle" behind the trouble makers' decisions. His attempt to state that he adopted the term "trouble makers" because that was how Merkner described them is disingenuous given that McNealy had already dispersed Carvalho's disclosure of them as the three responsible for a pursuing a potential overtime lawsuit. In the

---

Board's caselaw regarding implied threats to Griego or any lay witness. (Tr. 342.)

context of discussing overtime with Johnson and explaining why he thought Decker was exempt, Wallace stated, "I know she one of the 3 pushing this and I don't trust her." (GC Exh. 12.) Decker's knowledge of Griego and Johnson's protected concerted activity is squarely irrefutable.

The General Counsel must next prove animus or hostility toward the protected activity. Under Board precedent, improper motivation may be inferred from several factors, including pretextual and shifting reasons given for the personnel action, the timing between an employee's protected activities and the personnel action, and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc*., 344 NLRB 1188, 1193 (2005); *Promedica Health Systems*, 343 NLRB 1351, 1361 (2004). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. See *JAMCO*, 294 NLRB 896, 905 (1989), affd mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

The record makes clear that the Respondent harbored animus toward the individuals responsible for pursuing overtime pay. The timing of Wallace's visit to NBB shows that the potential for a lawsuit for overtime was something the Respondent intended to immediately quash. The day after Carvalho's call, Wallace got on Decker's private plane and went to Fort Collins. Though the Respondent attempted to minimize the overtime issue's role in the intent behind the visit, there is no doubt that Carvalho's report of the potential lawsuit was the catalyst. The only thing Wallace brought with him, other than his business cards, was the DOL fact sheet regarding overtime. Though his investigation may have revealed there was "a lot more going on than [they] knew about," it was clearly motivated by a desire to find out more about the overtime lawsuit and thwart it.[21] (GC Exhs. 12, 17.) *Kidde, Inc*, 294 NLRB 840, 840 fn. 3 (1989).

The timing of the adverse actions, roughly a week later, is strong evidence of unlawful motivation. See *Best Plumbing Supply*, 310 NLRB 143, 144 (1993); *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984). Moreover, the timing of the adverse employment actions occurred within days of interrogations and threats regarding same protected concerted activities that I have found violated the Act. *Cal Western Transport,* 316 NLRB 222, 223 (1995); *Richardson Bros. CP.*, 312 NLRB 534 (1993).

There is other evidence indicating animus that I will address in response to the Respondent's proffered reasons for the discipline and termination. Based on the evidence referenced both above and below, I find the General Counsel has met its initial burden.

Turning to the Respondent's proffered legitimate reasons for its actions, some of these reasons pertain to both Griego and Johnson while others are specific to the employee. The analysis below, therefore, is sometimes joint and other times is employee-specific.

The Respondent provided shifting explanations for Griego's termination. His termination letter cited only to "unsatisfactory job performance" yet in the termination record for the DAC system, his performance is denoted as "satisfactory." (GC Exhs. 10–11.) At the unemployment

[21] In this regard, I find the investigation was unlawfully motivated. Even though Wallace learned about more than the overtime issue, and took actions after the investigation aimed to correct other issues, I have no doubt the motivation behind it was Carvalho's disclosure of the overtime complaint.

compensation hearing, in addition to performance issues, the Respondent pointed to confrontational behavior with Wallace, another driver. At the instant trial, Wallace added Griego's behavior in connection with the garnishment. See *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters).

With regard to Griego's termination, Wallace said he relied in part of the "chest bumping" incident. This was based solely on an admittedly second-hand report. There was no investigation as to whether this in fact occurred, whether Griego was the aggressor, and whether anyone had been disciplined because of it. The failure to even ask Griego about this incident before deciding to use it against him is evidence of unlawful motivation. *Washington Nursing Home*, Inc., 321 NLRB 366, 375 (1996); *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007). Finally, Lackner's failure to testify about this matter warrants an adverse inference that the Respondent knew Griego was not the instigator.

Wallace relied on his observation of Griego sitting on a load at the end of his shift as another justification to terminate him. The evidence shows, however, that Wallace embellished this incident. In this regard, I find Wallace was not credible when he testified he arrived at NBB right at 5:00 a.m.. He had previously testified he arrived at 5:05, and when confronted with this inconsistency, repeatedly attempted to minimize it. In any event, he could not have seen Griego sit on a load for over 45 minutes because Griego's shift ended at 5:45 and Wallace did not arrive until after 5:00. Moreover, it is not clear whether Wallace knew if Griego had performed a pre-trip inspection, which would have added 15 minutes and made it impossible for him to return in time to clock out. See *Radisson Muehlebach Hotel* , 273 NLRB 1464, 1475–1476 (1985) (exaggeration evidence of pretext).

Griego's past warnings were also exaggerated. McNealy reported that Griego had two previous verbal warnings about not running over chocks. The evidence shows, however, that when he was hired there was a message on the grease board. The warning purported to be Griego's second took place on July 16, 2012, and Griego started working with Decker on June 6, 2012. Lackner had previously warned some other drivers about this, but Griego was not among them, most likely because he had not yet begun working for Decker. Moreover, there is no evidence whatsoever that Griego ever ran over chocks, and therefore no evidence that such conduct could be attributable to him. Lackner's failure to refute Griego's assertion that he was never spoken to about running over chocks warrants an adverse inference that Griego was not disciplined for any such infraction. Finally, Lackner was disciplined for the manner in which he gave these verbal warnings, so the Respondent's purported reliance on them to support discipline is evidence of pretext.

Wallace further cited Griego's aggressive and insubordinate behavior, both during the phone calls about his garnishment issue and during Wallace's site visit. Griego was not disciplined at the time, however, for the phone calls. *Care Manor of Farmington*, 314 NLRB 248, 255 (1994); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). It was not until after his concerted activity was discovered that the Respondent decided to terminate Griego. Importantly, the second instance of alleged aggressive and insubordinate behavior took place in the context of Wallace's investigation into Griego's protected activities. The Board has held that "[w]hen an employee's purported insubordination relates to his exercise of protected rights and is provoked

by the employer's unfair labor practices, the employee's conduct must be evaluated by comparing 'the seriousness of the employer's unlawful conduct with the extent of the employee's reaction.'" *Kolkka Tables*, 335 NLRB 844 (2001), quoting *Caterpillar, Inc*., 322 NLRB 674, 678 (1996), decision vacated pursuant to a settlement by unpublished order dated March 19, 1998. By the time Griego arrived at work, DeHerrera had warned him that Wallace was there looking into whether they were bringing a lawsuit for overtime. While I agree with the Respondent that Griego became loud and repeatedly voiced to Wallace that he could not attend a mandatory meeting on a snow day, I also find that Griego's guard was up, understandably, because of Wallace's visit. As the General Counsel points out, any raised voices were short-lived, both Wallace and Griego raised their voices, and the two later continued their lengthy conversation in a cordial manner. Moreover, Merkner also became animated and used the "F" word often when talking with Wallace, yet insubordination was not cited as a reason for his written warning.

With regard to the incident with the air lines, Griego was not disciplined for it at the time. Only several months later, after he engaged in protected concerted activity, was it used against him. *Care Manor of Farmington*, supra; *Clinton Food 4 Less*, supra.

Turning to Johnson, the only basis for her written warning that cited in the warning itself was her failure to do a pre-trip inspection on the day Wallace visited, April 30. Though Johnson's written warning references the purported "verbal warning" Lackner gave to all drivers about filling out pre-trip inspection forms correctly, Wallace testified he also considered Lackner's warnings about the use of chocks given to all drivers, as well as a complaint from a motorist and a prior warning about failing to do a pre-trip inspection. The Respondent's shifting explanations are evidence of pretext. In addition, as with Griego, there is no evidence that Johnson ran over chocks, and she testified that Lackner told her this message was directed mostly at Hutchins. Given Lackner's failure to testify, I draw an adverse inference and find the warning given to all drivers was not legitimately directed at any performance deficiency on Johnson's part. Finally, the asserted previous warning was not entered into the record at the hearing. What is a matter of record is that, in April 2013, Johnson was rated in the highest category for safety and compliance. (GC Exh. 23.)

The characterization of Johnson's failure to perform a pre-trip inspection as "insubordination" is likewise evidence of pretext. Specifically, the letter said Johnson violated Section 501 of the Decker's personnel policies entitled "Employee Conduct and Work Rules. It further stated, "It is not possible to list all forms of behavior that are considered unacceptable in the workplace; however, insubordination is specifically noted." Section 501 specifically cites "[i]nsubordination or other disrespectful conduct" as a grounds for discipline, along with other conduct, detailed in the statement of facts, that primarily concerns inappropriate behavior, not unsatisfactory work performance.

The failure to perform a pre-trip inspection was cited as a reason for Griego's termination and Johnson's written warning. The evidence regarding pre-trip inspections, cited above, is inconsistent at best. What is clear, however, is that Lackner's enforcement of when to do a pre-trip inspection and how thorough it needed to be varied. Initially, the drivers were told they could not open the hood at NBB, because of a proscription on preventative maintenance in the

employee manual.[22] Griego, Johnson, and DeHerrera all testified that Lackner instructed them that, if a load was staged and ready to go when they came on shift, they should deliver the load and do the pre-trip inspection later. Lackner was not called as a witness, and therefore did not refute this testimony, nor did any other witness. Accordingly, I credit it.

Lackner's previous July 16, 2012 "warning" about the pre-trip inspections also does not withstand scrutiny. The evidence shows that Lackner posted a message on the grease board instructing employees to fill out their pre-trip inspections correctly, with an example of how to fill out the form. The timing of the pre-trip inspection was not referenced, and Lackner told Johnson and DeHerrera they were filling out paperwork correctly. I credit this testimony and find that Lackner, if called, would corroborate it. As with the chocks, Lackner was disciplined for the manner in which he gave this so-called verbal warning, so the Respondent's purported reliance on it to support progressive discipline is further evidence of pretext.

Johnson testified that Wallace told her he had observed her and Griego failing to perform a pre-trip inspection but he understood his visit put them behind and out of synch, so he was not going to discipline them for it. Wallace recalled telling Johnson she had not done a pre-trip inspection. He did not specifically refute her testimony that he said she and Griego would not be written up for it. I find Johnson's testimony was credible. Her testimony about her conversation with Wallace was open-ended and appeared sincere. As a current employee testifying against her own pecuniary interests, I find her testimony to be particularly reliable. *Gold Standard Enterprises*, supra; *Georgia Rug Mill*, supra; *Gateway Transportation Co*, supra; *Unarco Industries, Inc*., supra.

Moreover, Wallace did not investigate why Griego and Johnson failed to perform pre-trip inspections prior to taking action against them for it, nor did he consult with Lackner prior to disciplining Johnson and terminating Griego. See *Embassy Vacation Resorts* , 340 NLRB 846, 848–849 (2003) (animus shown by employer's failure to give employees a chance to defend themselves). It is clear he wanted to gather the information he thought would support taking action against them, without concerning himself with the underlying circumstances.

Finally, as the General Counsel points out, if the failure to do a pre-trip inspection was such a grave concern, Wallace's actions make no sense. He observed both employees fail to perform pre-trip inspections, yet failed to intervene. This is particularly telling, given that Wallace was bound by FMCSA regulations to require the drivers to observe all duties prescribed to the drivers under those regulations, including performing a pre-trip inspection.

The Respondent makes numerous arguments regarding the legitimacy the discipline for Johnson and Griego's respective failures to perform a pre-trip inspection on April 30. Pertinent here is that Griego and Johnson did not perform complete pre-trip inspections that day prior to taking their first loads, and the timing had been a matter of inconsistent enforcement by Lackner. Though the Respondent argues that Lackner's knowledge that drivers did not always do a full pre-trip inspection prior to their shifts was not proved, the evidence shows otherwise. McNealy's email regarding her phone conversation with Carvalho end by stating, "Ron also mentioned that these same employees are not doing their pre-trip inspections . . . and Rick seems

[22] This was before Griego worked at Decker.

to be just letting it go." (GC Exh. 15.) Moreover, in the absence of Lackner's testimony, I infer that he would have corroborated the drivers' testimony that he had witnessed drivers failing to do a pre-trip inspection before taking their first load and failed to take action.

There is evidence that the progressive disciplinary policy was not applied consistently, further pointing to pretext. *Tubular Corp. of America*, 337 NLRB 99 (2001). Hutchins had received the same messages from Lackner about the chocks and pre-trip inspections, and had received a verbal warning for failing to place a jack stand under the trailer. The day after the warning for failing to place a jack stand under his trailer, he repeated this infraction, and received his "last verbal warning" prior to being written up. (GC Exh. 26(n).) Neither Johnson nor Griego were given this latitude. In addition, Merkner's comments about Johnson were grounds for immediate dismissal under Decker's zero-tolerance policy and section 501 of the Employee Conduct and Work Rules, yet even after learning of his conduct from multiple employees, Merkner was treated to dinner and given a written warning.

Based on the foregoing, I find the General Counsel has shown the Respondent's reasons for terminating Griego and disciplining Johnson were pretext to mask unlawful retaliation.

Finally, even absent a showing of pretext, I find the Respondent has not shown it would have given Johnson a written warning and fired Griego absent their protected concerted activity, due to the unlawful motivation behind the investigation. "An employer violates Section 8(a)(1) when it subjects an employee to an investigation, and possible discipline, based on the employee's conduct in the course of protected activity." *Consolidated Diesel Co.,* 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001); *Supershuttle of Orange County, Inc*. 339 NLRB 1 (2003). In *Kidde, Inc*., supra, 294 NLRB 840, 840 fn. 3, the Board, citing to precedent, stated:

> [E]mployees misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a discharge lawful. See, e.g., *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 121-122 (1979) (if investigation commenced to find lawful reasons for discharges motivated by an actual unlawful reason, evidence of misconduct would not render the discharges lawful); *Campbell "66" Express*, 238 NLRB 953, 963 (1978), enf. denied 609 F.2d 312 (7th Cir. 1979) (misconduct uncovered during investigation undertaken because of protected activity and aimed at undermining the employee's Sec. 7 rights does not convert the discharge into a legitimate one). See also *Chrysler Corp*., 242 NLRB 577 (1979); *American Motors Corp*., 214 NLRB 455 (1974), enfd. 525 F.2d 695 (7th Cir. 1975).

The investigation here was clearly "undertaken because of protected activity and aimed at undermining the employee's Sec. 7 rights" and I find therefore that any ensuing discipline is not legitimate.

The Respondent cites to *Praxair Distribution, Inc*., 357 NLRB No. 91 (2011), to support a contrary conclusion. In *Praxair,* however, the complaint prompting the investigation concerned working conditions. In the instant case, the complaint spurring the investigation focused on the employees' protected concerted activity of discussing a lawsuit about overtime and trying to get others to join it.

F. Service of Subpoena on Jennifer Johnson

The Respondent, through counsel, served Johnson with a subpoena duces tecum on March 31, 2014, at her workplace. (GC Exh. 24.) At the hearing, I granted the General Counsel's motion to amend the complaint to include an allegation that this action violated Section 8(a)(1) of the Act.

An employer violates Section 8(a)(1) by demanding that an employee give it a copy of the confidential affidavit she provided to a Board agent. *Inter-Disciplinary Advantage*, 349 NLRB 480, 505 (2007); *Frascona Buick, Inc*., 266 NLRB 636, 647 (1983); *Ingram Farms*, *Inc.*, 258 NLRB 1051, 1055 (1981), enfd. 685 F.2d 1387 (11th Cir. 1982); *W.T. Grant Co*., 144 NLRB 1179, 1182 (1963).[23] Such demands are inherently coercive and are therefore unlawful. See *Inter-Disciplinary Advantage*, supra at 505. In the instant case, the Respondent demanded that Johnson produce all documents related to communications she had with the NLRB concerning the instant case and her FLSA case. Her affidavit given to the Board in the instant case was not excluded. Given the broad definition of "document" and the lack of any exclusions, this clearly would be interpreted to include Johnson's affidavit in connection with the Board's investigation, and is therefore inherently coercive. The cases the Respondent cites to requesting more specific information do not negate the fact that the request at issue before me encompasses Johnson's affidavit. Accordingly, I find this request violated the Act as alleged.

As to the remainder of the allegations outlined in the General Counsel's brief, they rest upon caselaw that the Board has set aside due to the Supreme Court's decision in *Noel Canning,* supra. Given that Johnson was represented by counsel in the instant case, and the matter was resolved by Miller's filing of a petition to revoke the provisions that called for privilege or were otherwise objectionable, I find the General Counsel has not proved the remaining subpoena requests violated Section 8(a)(1). Accordingly, I recommend dismissal of these allegations.

CONCLUSIONS OF LAW

1. By interrogating employees about their protected concerted activities and the protected concerted activities of other employees, threatening its employees with discharge if they complained about the Respondent not paying its employees overtime pay, issuing Jennifer Johnson a written warning and terminating Joseph Griego because of their protected concerted activities, and issuing Jennifer Johnson a subpoena encompassing a request for her Board affidavit, the Respondent violated Section 8(a)(1) of the Act.

2. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

[23] The General Counsel cites to *Ampersand Publishing, LLC*, 358 NLRB No. 155 (2012). That case, however, was set aside by the Board following the Supreme Court's decision in *NLRB v. Noel Canning*, *a Division of the Noel Corp.*, 134 S.Ct. 2250 (2014).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall issue and order recommending it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having interrogated employees about concerted protected activities and impliedly threatened employees with loss of employment for engaging in protected concerted activities, the Respondent will be ordered to cease and desist from these actions.

Having issued a subpoena to employee Jennifer Johnson, prior to her testimony at a National Labor Relations Board hearing, requesting a copy of any affidavits she has submitted to the National Labor Relations Board in an unfair labor practice investigation, the Respondent will be ordered to cease and desist from these actions.

The Respondent having unlawfully disciplined Jennifer Johnson by issuing her a written warning for failing to conduct a pre-trip inspection will be ordered to restore the status quo ante and make appropriate changes to her personnel files and/or other supervisor-maintained files.

The Respondent, having discriminatorily discharged Joseph Griego, must offer them reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc*., 359 NLRB No. 44 (2012).

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 5–6 (2010). Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id., slip op. at p. 3. See, e.g*., Teamsters Local 25*, 358 NLRB No. 15 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Decker Truck Line, Inc., Fort Collins, Colorado, its officers, agents, successors, and assigns, shall

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from interrogating employees about concerted protected activities and impliedly threatening employees with loss of employment for engaging in protected concerted activities; issuing subpoenas to current employees prior to their testimony at a Board hearing that request copies of affidavits they had submitted to the Board in an unfair labor practice investigation; disciplining and terminating employees for engaging in protected concerted activities; and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Jennifer Johnson, and within 3 days thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.

(b) Within 14 days from the date of the Board's Order, offer Joseph Griego full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Joseph Griego whole for any loss of earnings and other benefits suffered as a result of the discrimination against her as specified in the remedy portion of this decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to Jospeh Griego's unlawful discharge and within 3 days thereafter notify him in writing that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

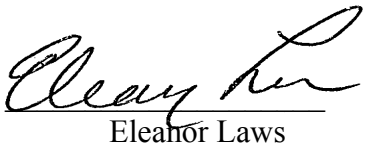
(g) Within 14 days after service by the Region, post at its facilities in Fort Collins, Colorado, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 29, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 23, 2014



Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

Accordingly, we give our employees the following assurances:

WE WILL NOT interrogate you about your protected concerted activities or the protected concerted activities of others.

WE WILL NOT make implied threats to you that engaging in protected concerted activity could result in job loss.

WE WILL NOT issue subpoenas to employees prior to their testimony at a National Labor Relations Board hearing that request copies of affidavits they have submitted to the National Labor Relations Board in an unfair labor practice investigation

WE WILL NOT discipline you because of your protected concerted activities.

WE WILL NOT terminate you because of your protected concerted activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL remove from our files any reference to Jennifer Johnson's May 6, 2013, written warning for failure to perform a pre-trip inspection and **WE WILL** notify her in writing that this has been done and that the removed material will not be used against her in any way.

WE WILL reinstate Joseph Griego to the position of employment he held on May 6, 2013, or, if such a position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges that he enjoyed as May 6, 2013.

WE WILL make whole Joseph Griego for the losses he suffered as a result of our unlawful suspension and discharge of him and **WE WILL** compensate him for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL remove from our files any reference to Joseph Griego's discharge, and **WE WILL** notify him in writing that this has been done and that the removed material will not be used against him in any way.

DECKER TRUCK LINE, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433
(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-107239 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-6647.